

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

DEC 17 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KATHRYN C.,)	2 CA-JV 2010-0069
)	DEPARTMENT B
Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC)	Appellate Procedure
SECURITY, SHAYLA R. and JAYLEAH C.,)	
)	
Appellees.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J16095800

Honorable Stephen M. Rubin, Judge Pro Tempore

AFFIRMED

Curtis & Cunningham
By Cynnamon Arizpuru

Tucson
Attorneys for Appellant

Terry Goddard, Arizona Attorney General
By Michelle R. Nimmo

Tucson
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Department of Economic Security

V Á S Q U E Z, Presiding Judge.

¶1 In her opening brief in this appeal, Kathryn C. challenges the juvenile court's order denying her motion to set aside the court's order terminating her parental rights to her children Shayla R. and Jayleah C. We lack jurisdiction to address the

propriety of the juvenile court's ruling on that motion and, for the reasons stated, affirm the juvenile court's order terminating Kathryn's parental rights.

¶2 Shayla and Jayleah were adjudicated dependent in October 2008 after a hearing that Kathryn failed to attend. As directed by the juvenile court following a permanency hearing in February 2010, the Arizona Department of Economic Security (ADES) filed a motion to terminate her parental rights. When Kathryn failed to appear at the June 2, 2010, pretrial conference, the court proceeded with the severance hearing in her absence. After considering the evidence ADES then presented, the court granted the motion, terminating Kathryn's parental rights on the three grounds alleged in the motion: abuse or neglect, mental illness or chronic substance abuse, and length of time in court-ordered care. *See* A.R.S. § 8-533(B)(2), (3), (8)(c). On June 23, 2010, Kathryn filed a notice of appeal from the severance order.

¶3 Two days after she filed the notice of appeal, Kathryn filed a "motion to set aside judgment" pursuant to Rule 60(c), Ariz. R. Civ. P., arguing she had failed to appear as a result of excusable neglect and asserting she had a meritorious defense to the motion. On July 1, 2010, she filed a motion in this court, asking us to stay the appeal and reconstitute jurisdiction in the juvenile court to permit it to conduct the hearing on the Rule 60(c) motion scheduled for July 7, and to rule on the motion. We granted Kathryn's request. Following the hearing, the juvenile court denied the Rule 60(C) motion. We subsequently vacated the stay of and reinstated the existing appeal.

¶4 In her opening brief, Kathryn contends she failed to attend the severance hearing as a result of excusable neglect as contemplated by Rule 60(c)(1). She argues she “deserves to be allowed a full trial” and that the judgment should have been set aside. Acknowledging that Rule 60(c) requires the movant to establish not only excusable neglect but a meritorious defense to the claim, she argues she sustained that burden below and requests that this court “vacate[]” the juvenile court’s order denying the motion to set aside the judgment and remand this matter “for a full severance trial.”

¶5 Kathryn’s arguments on appeal relate solely to the propriety of the juvenile court’s denial of her motion to set aside the severance order. Indeed, she is not asking us to reverse the severance order, rather she is requesting that there be further hearing on ADES’s motion to terminate her parental rights that she may attend. But, as ADES points out in its answering brief, Kathryn has not filed a notice of appeal from the court’s August 5, 2010 order denying the Rule 60(c) motion. “An order denying or granting a motion to set aside a judgment under Rule 60(c), Arizona Rules of Civil Procedure, is appealable as a ‘special order made after final judgment.’” *M & M Auto Storage Pool v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 141, 791 P.2d 665, 667 (App. 1990), quoting A.R.S. § 12-2101(C).¹ Our jurisdiction is limited to reviewing what is specified in the notice of appeal, which must “designate the judgment or part thereof appealed from.” Ariz. R. Civ. App. P. 8(c); *see also Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003

¹We note that Rule 46(E), Ariz. R. P. Juv. Ct., provides that “[a] motion to set aside a judgment rendered by the [juvenile] court shall conform to the requirements of Rule 60(c)”

(App. 1982) (court of appeals lacks jurisdiction to review matters not contained in notice of appeal). Consequently, when, as here, a party appeals before there has been a ruling on a motion to set aside a judgment and does not “file another notice of appeal after the trial court issue[s] its decision,” we lack jurisdiction to address the merits of that party’s challenge to the denial of the motion. *Navajo Nation v. MacDonald*, 180 Ariz. 539, 547, 885 P.2d 1104, 1112 (App. 1994); *see also China Doll Rest., Inc. v. Schweiger*, 119 Ariz. 315, 316, 580 P.2d 776, 777 (App.1978) (finding appellate court lacked jurisdiction to consider trial court ruling “not contained in the notice of appeal” and made “approximately two months after the notice of appeal was filed”); *Rexing v. Rexing*, 11 Ariz. App. 285, 290, 464 P.2d 356, 361 (1970) (after final judgment entered and notice of appeal filed, absent separate notice of appeal from subsequent order denying motion for attorney fees, appellate court lacked jurisdiction over issues relating to that motion).

¶6 The scope of an appeal from the denial of a motion to set aside a judgment “is restricted to the questions raised by the motion to set aside” and does not confer upon this court jurisdiction to review the judgment itself. *Hirsch v. Nat’l Van Lines, Inc.*, 136 Ariz. 304, 311, 666 P.2d 49, 56 (1983); *Goglia v. Bodnar*, 156 Ariz. 12, 16, 749 P.2d 921, 925 (App.1987). Conversely, a notice of appeal from a judgment does not provide the court of appeals with jurisdiction to review issues relating to the denial of a motion to set aside that judgment. *See Rexing*, 11 Ariz. App. at 290, 464 P.2d at 361. We therefore lack jurisdiction to address the propriety of the juvenile court’s ruling on Kathryn’s motion.

¶7 ADES nonetheless responds to the merits of Kathryn’s contentions to the extent her claim “could be understood to allege error in the juvenile court’s finding that [she] failed to appear at the severance trial without ‘good cause.’” Kathryn’s brief makes clear, however, that she is challenging the court’s denial of her motion to set aside the severance order. But even assuming, without deciding, that any portion of Kathryn’s brief could be construed as a direct challenge to the propriety of the severance order, nothing in her brief or the record as it existed at the time of the pretrial conference/severance hearing persuades us that the court erred in proceeding with the hearing in her absence.

¶8 The juvenile court was permitted to proceed in Kathryn’s absence and terminate her rights. *See* A.R.S. § 8-863(C) (when parent fails to attend severance hearing after having been provided notice, court may proceed with hearing, find parent waived rights and admitted allegations of motion to terminate, and sever parental rights); *see also* Ariz. R. P. Juv. Ct. 64(C) (providing same with respect to failure to appear at initial hearing, pretrial conference, status conference or termination adjudication hearing without good cause). At the beginning of the hearing, the court noted Kathryn’s absence and pointed out she had “been notified on numerous occasions of her rights and the consequences of her failure to appear,” a finding the record amply supports.

¶9 The juvenile court asked Kathryn’s counsel if he had any explanation for her absence and counsel responded that he did not, adding that he was unable to reach her at that time. The court then correctly pointed out that the March 22, 2010, minute entry

from the initial severance hearing reflected Kathryn had been present at that time and the pretrial conference had been set for June 2. The court noted further that the minute entry from that date reflected the court had “admonished” Kathryn “of the consequences of her failure to appear.” The court then granted ADES’s request to allow the case to proceed. In its minute entry terminating Kathryn’s parental rights, the court specified the various notices Kathryn had received regarding the consequences of failing to appear, found Kathryn had been admonished on March 22 of the consequences of not appearing, and noted “there ha[d] been no evidence presented to the Court to indicate good cause for her absence.”

¶10 The record thus supports the juvenile court’s order terminating Kathryn’s parental rights to Shayla and Jayleah. Because we lack jurisdiction to do so, we do not consider the propriety of the court’s August 5, 2010, order denying her motion to set aside the severance order.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge